

# The Obviousness of Anarchy: Uniformity of Rules Of Law - The Art of Not Being Governed

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*Written by John Hasnas, Associate Professor, Georgetown University, J.D., Ph.D, LL.M.*

Continued from [The Obviousness of Anarchy: The Creation of Rules of Law](#)

Supporters of government claim that government is necessary to ensure that there is one law for all and that the law applies equally to all citizens. If the government does not make the law, they contend, there would be no uniform code of laws. People in different locations or with different cultural backgrounds or levels of wealth would be subject to different rules of law.

The proper response to this is probably the one Woody Allen made to Diane Keaton in *Annie Hall* when she complained that her apartment had bad plumbing and bugs, which was: "You say that as though it is a negative thing." How persuasive is the following argument? Government is necessary to ensure that there is one style of dress for all and that all citizens are equally clothed. If the government does not provide clothes, there would be no uniform mode of dress. People in different locations or with different cultural backgrounds or levels of wealth would be clothed in garments of different styles and quality.



Why would anyone think that uniformity in law is any more desirable than uniformity in dress? The quest for uniformity leads us to treat the loving husband who kills his terminally ill wife to relieve her suffering the same way we treat Charles Manson, to apply the same rules of contracting to sophisticated business executives purchasing corporations and semi-literate consumers entering into installment contracts, and to act as though the slum lord in the Bronx and the family letting their spare room in Utica should be governed by the same rules of property law.

There are, of course, certain rules that must apply to all people; those that provide the basic conditions that make cooperative behavior possible. Thus, rules prohibiting murder, assault, theft, and other forms of coercion must be equally binding on all members of a society. But we hardly need government to ensure that this is the case. These rules always evolve first in any community; you would not even have a community if this were not the case.

The idea that we need government to ensure a uniform rule of law is especially crazy in the United States, in which the federal structure of the state and national governments is designed to permit legal diversity. To the extent that the law of the United States can claim any superiority to that produced by other nations, it is at least partially due the fact that it was generated by the common law process in the "laboratory of the states." **8**

Allowing the development of different rules in different states teaches us which rules most effectively resolve disputes. To the extent that the conditions that give rise to disputes are the same across the country, the successful rules tend to be copied by other jurisdictions and spread. This creates a fairly uniform body of law. **9** To the extent that the conditions that give rise to disputes are peculiar to a particular location or milieu, they do not spread. This creates a patchwork of rules that are useful where applied, but would be irrelevant or disruptive if applied in other settings.

One of the beauties of the common law process is that it creates a body of law that is uniform where uniformity is useful and diverse where it is not. This is the optimal outcome. Government legislation, in contrast, creates uniformity by imposing ill-fitting, one-size-fits-all rules upon a geographically and ethnically diverse population. Once again, not only is government not necessary to the creation of a well-functioning body of law, it is a significant impediment to it. Please consider this the next time you find yourself wondering why all businesses must be closed on Sunday in the Orthodox Jewish sections of Brooklyn.

To be continued in ***The Obviousness of Anarchy: Accessibility of Rules of Law***

***Footnotes:***

**8** See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

**9** Fairly, but not fetishistically. The law against homicide functions quite effectively despite the fact that the definitions of first and second degree murder and voluntary and involuntary manslaughter differ from state to state.

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# The Obviousness of Anarchy: The Question - The Art of Not Being Governed

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*Written by John Hasnas, Associate Professor, Georgetown University, J.D., Ph.D, LL.M.*

*"You see, but you do not observe."*

*Sherlock Holmes to Dr. John Watson in A Scandal in Bohemia*

## I. Introduction

In this article, I have been asked to present an argument for anarchy. This is an absurdly easy thing to do. In fact, it is a task that can be discharged in two words—look around. However, because most of us, like Dr. Watson, see without observing the significance of what we see, some commentary is required.

Anarchy refers to a society without a central political authority. But it is also used to refer to disorder or chaos. This constitutes a textbook example of Orwellian newspeak in which assigning the same name to two different concepts effectively narrows the range of thought. For if lack of government is identified with the lack of order, no one will ask whether lack of government actually results in a lack of order. And this uninquisitive mental attitude is absolutely essential to the case for the state. For if people were ever to seriously question whether government actions are really productive of order, popular support for government would almost instantly collapse.



The identification of anarchy with disorder is not a trivial matter. The power of our conceptions to blind us to the facts of the world around us cannot be gainsaid. I myself have had the experience of eating lunch just outside Temple University's law school in North Philadelphia with a brilliant law professor who was declaiming upon the absolute necessity of the state provision of police services. He did this just as one of Temple's uniformed private armed guards passed by us escorting a female student to the Metro stop in this crime-ridden neighborhood that is vastly underserved by the

Philadelphia police force.

A wise man once told me that the best way to prove that something is possible is to show that it exists. That is the strategy I shall adopt in this article. I intend to show that a stable, successful society without government can exist by showing that it has, and to a large extent, still does.

## II. Defining Terms and Limitations

I am presenting an argument for anarchy in the true sense of the term—that is, a society without government, not a society without governance. There is no such thing as a society without governance. A society with no mechanism for bringing order to human existence is oxymoronic; it is not "society" at all.

One way to bring order to society is to invest some people with the exclusive power to create and coercively enforce rules which all members of society must follow; that is, to create a government. Another way to bring order to society is allow people to follow rules that spontaneously evolve through human interaction with no guiding intelligence and may be enforced by diverse agencies. This article presents an argument for the latter approach; that is, for a spontaneously ordered rather than a centrally planned society.

In arguing for anarchy, I am arguing that a society without a central political authority is not only possible but desirable. That is all I am doing, however. I am not arguing for a society without coercion. I am not arguing for a society that abides by the libertarian non-aggression principle or any other principle of justice. I am not arguing for the morally ideal organization of society. I am not arguing for utopia. What constitutes ideal justice and the perfectly just society is a fascinating philosophical question, but it is one that is irrelevant to the current pursuit. I am arguing only that human beings can live together successfully and prosper in the absence of a centralized coercive authority. To make the case for anarchy, that is all that is required.

An additional limitation on my argument is that I do not address the question of national defense. There are two reasons for this. One is the logical one that a society without government is a society without nations. In this context, “national” defense is a meaningless concept. If you wish, you may see this as an assertion that an argument for anarchy is necessarily an argument for global anarchy. I prefer to see it merely as the recognition that human beings, not nations, need defense. The more significant reason, however, is that I regard the problem of national defense as trivial for reasons I will expand upon subsequently.<sup>1</sup>

### III. The Question

Whether government is necessary is not an abstract metaphysical question. It is an entirely practical question concerning the delivery of goods and services. The defenders of government argue that certain goods or services that are essential to human life in society can be supplied only by a government. Anarchists deny this. The question, then, is whether there are any essential goods or services that can be supplied only through the conscious actions of human beings invested with the power to enforce rules on all members of society.

Note that the question is not whether the “market” can supply all necessary goods and services, at least not the market as it is usually defined by economists. Some anarchists argue that the free market can supply all necessary goods and services. But the case for anarchy does not require that one assert this claim, and I do not. Anarchy requires, and I argue, only that no essential good or service must be supplied through the conscious actions of the agents of a coercively maintained monopoly. Properly understood, the question is whether there are some essential goods and services that must be provided politically or whether all such goods and services can be provided by non-political means.<sup>2</sup>

Many political theorists argue that there is a wide array of goods and services that must be provided by the state. In the present context, however, there is no need to consider whether the government must provide postal service, elementary schooling, or universal health insurance. The debate between anarchists and the supporters of a classical liberal, night watchman state concerns the core functions of government. The question thus resolves itself into whether these core functions can be supplied through non-political means.

*To be continued in [The Obviousness of Anarchy: The Creation of Rules Of Law](#)*

### Footnotes

<sup>1</sup> See *infra* §III(E).

<sup>2</sup> In this article, the term “political” will be used to refer to the output of government, and “non-political” to the product of all other forms of action.

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Continued from [The Obviousness of Anarchy: The Question](#)

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## IV. The Answer

### A. Rules of Law

#### 1. CREATION

Supporters of government claim that government is necessary to provide the fundamental rules that bring order to human life in society. Without government to create rules of law, they contend, human beings are unable to banish violence and coordinate their actions sufficiently to produce a peaceful and prosperous society, and hence, are doomed to a Hobbesian existence that is “solitary, poor, nasty, brutish, and short.”

3

The proper response to this is: look around. Those of us residing in the United States or any of the British Commonwealth countries live under an extremely sophisticated and subtle scheme of rules, very few of which were created by government. Since almost none of the rules that bring peace and order to our existence were created by government, little argument should be required to establish that government is not necessary to create such rules. On the contrary, it is precisely the rules that were created by government that tend to undermine peace and order.



*rules not rulers*

The Anglo-American legal system is often referred to as a common law legal system. This is unfortunate, given the anachronistic contemporary understanding of the term “common law.” Currently, common law is associated with “judge-made” law. For most of the formative period of the common law, however, judges did not make the law, but merely presided over proceedings where disputes were resolved according to the accepted principles of customary law. Hence, describing the English common law as judge-made law is akin to describing the market as something created by

economists.

English common law is, in fact, case-generated law; that is, law that spontaneously evolves from the settlement of actual disputes. Almost all of the law that provides the infrastructure of our contemporary society was created in this way. Tort law, which provides protection against personal injury; property law, which demarcates property rights; contract law, which provides the grounding for exchange; commercial law, which facilitates complex business transactions; and even criminal law, which punishes harmful behavior, all arose through this evolutionary process. It is true that most of our current law exists in the form of statutes. This is because much of the common law has been codified through legislation. But the fact that politicians recognized the wisdom of the common law by enacting it into statutes, hardly proves that government is necessary to create rules of law. Indeed, it proves precisely the opposite.

English law provides a nice illustration of how law evolves when not preempted by government. When people live together in society, disputes inevitably arise. There are only two ways to resolve these disputes;

violently or peacefully. Because violence has high costs and produces unpredictable results, human beings naturally seek peaceful alternatives. The most obvious such alternative is negotiation. Hence, in Anglo-Saxon times, the practice arose of holding violent self-redress in abeyance while attempts were made to reach a negotiated settlement. This was done by bringing the dispute before the communal public assembly, the moot, whose members, much like present-day mediators, attempted to facilitate an accommodation that the opposing parties found acceptable. When reached, such accommodations resolved the dispute in a way that preserved the peace of the community.

The virtue of settling disputes in this way was that the moot had an institutional memory. When parties brought a dispute before the moot that was similar to ones that had been resolved in the past, someone would remember the previous efforts at settlement.

Accommodations that had failed in the past would not be repeated; those that had succeeded would be. Because the moot was a public forum, the repetition of successful methods of composing disputes gave rise to expectations in the community as to what the moot would recommend in the future, which in turn gave the members of the community advance notice of how they must behave. As the members of the community conformed their behavior to these expectations and took them into consideration in the process of negotiating subsequent accommodations, rules of behavior gradually evolved.

This, in turn, allowed for the transformation of the dispute settlement procedure from one dominated by negotiation to one consisting primarily in the application of rules. The repetition of this process over time eventually produced an extensive body of customary law that forms the basis of English common law.<sup>4</sup>

It is true that, beginning in the late twelfth century, the common law developed in the royal courts, but this does not imply that either the king or his judges made the law. On the contrary, for most of its history, the common law was entirely procedural in nature. Almost all of the issues of concern to the lawyers and judges of the king's courts related to matters of jurisdiction or pleading; that is, whether the matter was properly before the court, and if it was, whether the issues to be submitted to the jury were properly specified. The rules that were applied were supplied by the customary law. As Harold Berman explains,

[T]he common law of England is usually said to be itself a customary law. . . .What is meant, no doubt, is that the royal enactments established procedures in the royal courts for the enforcement of rules and principles and standards and concepts that took their meaning from custom and usage. The rules and principles and standards and concepts to be enforced . . . were derived from informal, unwritten, unenacted norms and patterns of behavior.<sup>5</sup>

Thus, as late as 1765, Blackstone identified the common law with “general customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification.”<sup>6</sup> Indeed, modern commercial law is derived almost entirely from the customary law merchant that Lord Mansfield engrafted onto the common law wholesale in the eighteenth century.<sup>7</sup>

The interesting thing about the common law process is that it creates law only where it is actually needed to allow human beings to live together peacefully. Consider the torts of assault and battery. Battery forbids one from intentionally making “harmful or offensive contact” with another. This prohibits not only direct blows, but snatching a plate out of someone's hand or blowing smoke in his or her face. Assault forbids one from intentionally causing another to fear he or she is about to be battered, but it does not prohibit attempts at battery of which the victim is unaware or threats to batter someone in the future. These torts protect individuals against not only physically harmful contact, but against all offensive physical contact as well as the fear that such contact will be immediately forthcoming.

When I teach Torts, I ask the students to account for these rules. Being products of the legislative age, they



inevitably launch into some theory of justice or moral desert or human rights, which invariably fails to account for the contours of the law. After all, attempting to batter someone is morally blameworthy whether or not the intended victim is aware of it, and one hardly has the right not to be offended.

The students fail because they think of the law as created by conscious human agency to serve an intended end. Thus, they miss the simpler evolutionary explanation. In earlier centuries, one of the most urgent social needs was to reduce the level of violence in society. This meant discouraging people from taking the kind of actions that were likely to provoke an immediate violent response. Quite naturally, then, when disputes arising out of violent clashes were settled, the resolutions tended to penalize those who had taken such actions. But what type of actions are these? Direct physical attacks on one's person are obviously included. But affronts to one's dignity or other attacks on one's honor are equally if not more likely to provoke violence. Hence, the law of battery evolved to forbid not merely harmful contacts, but offensive ones as well.

Furthermore, an attack that failed was just as likely to provoke violence as one that succeeded, and thus gave rise to liability. But if the intended victim was not aware of the attack, it could not provoke a violent response, and if the threat was not immediate, the threatened party had time to escape, enlist the aid of others, or otherwise respond in a nonviolent manner. Hence, the law of assault evolved to forbid only threats of immediate battery of which the target was aware.

This example shows how the common law creates the rules necessary for a peaceful society with minimal infringement upon individual freedom. Law that arises from the settlement of actual conflicts, settles conflicts. It does not create a mechanism for social control. Common law is law that is created by non-political forces. As such, it can give us rules that establish property rights, ground the power to make contracts, and create the duty to exercise reasonable care not to injure our fellows, but not those that impose a state religion, segregate races, prohibit consensual sexual activity, or force people to sell their homes to developers. Only government legislation, which is law that is consciously created by whatever constitutes the politically dominant interest, can give us rules that restrict the freedom of some to advance the interests or personal beliefs of others.

The unenacted common law provides us with rules that facilitate peace and cooperative activities. Government legislation provides us with rules that facilitate the exploitation of the politically powerless by the politically dominant. The former bring order to society; the latter tend to produce strife. Hence, not only is government not necessary to create the basic rules of social order, it is precisely the rules that the government does create that tend to undermine that order.

*To be continued in **The Obviousness of Anarchy: Uniformity of Rules of Law***

### **Footnotes**

3 T. HOBBS, LEVIATHAN 107 (H. Schneider ed., 1958) (1651).

4 For a fuller account of this process, see John Hasnas, Toward a Theory of Empirical Natural Rights, 22 SOCIAL PHILOSOPHY AND POLICY 111 (2005) and John Hasnas, Hayek, the Common Law, and Fluid Drive, 1 NEW YORK UNIVERSITY JOURNAL OF LAW & LIBERTY 79 (2005). See also ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW, ch.8 (1966).

5 HAROLD BERNAN, LAW AND REVOLUTION 81 (1983).

6 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1765). See also FREDERICK POLLOCK, FIRST BOOK OF JURISPRUDENCE 254 (6th ed. 1929) (“[T]he common law is a customary law if, in the course of about six centuries, the undoubting belief and uniform language of everybody who had occasion to consider the matter were able to make it so.”).



7 See LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 27 (1983). The story of the evolution of modern commercial law from the customary law merchant is an often told tale. In addition to Trakman's account, see also HAROLD BERMAN, LAW AND REVOLUTION ch.11 (1983), BRUCE BENSON, THE ENTERPRISE OF LAW 30-35 (1990), and John Hasnas, Toward a Theory of Empirical Natural Rights, 22 SOCIAL PHILOSOPHY AND POLICY 111, 130-31 (2005). For a useful account of the customary nature of the English common law see, Todd Zywicki, The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis, 97 NW. U. L. REV. 1551 (2003). See also J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 2-74 (4th ed. 2002) and John Hasnas, Hayek, Common Law, and Fluid Drive, 1 N.Y.U. JOURNAL OF LAW & LIBERTY 79 (2005).

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## The Obviousness of Anarchy: Public Goods - The Art of Not Being Governed

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Continued from [The Obviousness of Anarchy: Internalizing Externalities](#)

Supporters of government claim that government is necessary to produce “public goods;” goods that are important for human well-being but either cannot be produced or will be under-produced by the market. Public goods are goods that are both non-rivalrous in consumption; that is, its use by one person does not interfere with its use by others, and nonexclusive; that is, if the good is available to one person, it is available to all whether they help produce it or not. Supporters of government argue that such goods cannot be produced without government because, due to the free rider and assurance problems, individuals will not voluntarily contribute the capital necessary for their production.

The free rider problem refers to the fact that because people can enjoy public goods without paying for them, many will withhold their contribution to the goods’ production and attempt to free ride on the contribution of others. The assurance problem refers to the fact that in the absence of some assurance that others will contribute enough to produce the good, people are more likely to regard their own contribution as a waste of money and withhold it. Therefore, government is necessary to ensure the production of important public goods.



*rules not rulers*

The proper response to the argument that government is necessary to produce public goods is: Like what? Like lighthouses? The light they provide is available to all ships and its use by one does not impair its value to others. But wait, lighthouses can be and have been supplied privately. [31] Like radio and television? A wag I know likes to say that he does something impossible every night by watching commercial television. After all, television signals are non-rivalrous in consumption and nonexclusive.

Therefore, they cannot be produced by the market. Like the internet? But wait, that is privately funded also.

Perhaps like police and courts? Theorists frequently argue that police services and courts are public goods that must be supplied by government. With regard to police services, for example, the argument is made that:

*Security of person is to a large degree a collective good. . . . [A]n important part of the service provided by public police and systems of criminal justice generally is to deter potential violators from harming people. And this deterrence is an indivisible nonexcludable good to neighbors and visitors. . . . In addition to deterrence, there may be the benefits that follow from incarceration of the thief—namely, incapacitation—benefits that are also indivisible and nonexcludable.*

*Social order, at least security of persons and possessions, then, is to a considerable degree a collective good. Accordingly, to the degree that this is the case, social order may not be efficiently provided in the absence of a state. [32]*

Similarly, with regard to courts, it is argued that because the existence of definite and widely-known rules of behavior provides a nonexcludable benefit to all, private courts lack an incentive to establish the clear precedents that give rise to rules. Indeed, because clear precedents “would confer an external, an

uncompensated benefit, not only on future parties, but also on competing judges, . . . judges might deliberately avoid explaining their results because the demand for their services would be reduced by rules that, by clarifying the meaning of the law, reduce the incidence of disputes.” [33]

Hence, government courts are necessary for the development of rules of law.

These are perfectly logical theoretical arguments belied only by the facts of reality. The evidence that police services and courts are not public goods is that, like lighthouses, television, and the internet, they have been supplied non-politically for most of human history.

It is true, of course, that if government exists and creates areas of unowned, politically-controlled, property that no private party has an interest in maintaining, police services are likely to be under-produced in these locations. Policing of this “public” property may indeed have to be supplied by the government. However, this is not because police services are a public good that cannot be supplied by the market, but because police services will not be supplied when the market has been suppressed by the government. And although it is certainly true that private police services produce an uncompensated positive externality in that their deterrent effects make even those who have not paid for them more secure, this can hardly be a reason for believing that such services will not be produced. It is actually quite difficult to think of any useful activity that does not produce some uncompensated positive externality. My using deodorant and going about clothed certainly do, but government is not required to pay me to induce me to bathe and dress. Further, it is at least odd to argue that a system of competitive courts will not produce rules of law in a common law legal system in which the rules on which our civilization rests actually arose out of just such a system. [34]

Like national defense? National defense is perhaps the archetypical public good. The security it provides is both non-rivalrous in consumption and benefits all members of society whether they pay for it or not. Can national defense be adequately supplied without government?

If ‘national defense’ refers to the type of military expenditures associated with contemporary national governments, the answer is an obvious ‘no.’ Once a state becomes invested with the power to expropriate the wealth of its citizenry to provide for national defense, almost any desired expenditure begins to look like a requirement for national defense. Before long propping up Southeast Asian dictators and overthrowing Middle Eastern ones are being characterized as urgent national defense concerns. The fact that there is no non-governmental way to raise sufficient capital to realize this conception of national defense proves nothing about the viability of anarchy, and, in fact, serves as one more argument in favor of markets.

However, if ‘national defense’ refers to only what is strictly necessary to protect the citizens of a nation against outside aggression, I am willing to admit that I do not know the answer to this question. I am not discomforted by this admission, however, because as I said at the outset, the question of national defense is, as a practical matter, a trivial one. No one believes that we can transition from a world of states to anarchy instantaneously. No reasonable anarchist advocates the total dissolution of government tomorrow. Once we turn our attention to the question of how to move incrementally from government to anarchy, it becomes apparent that national defense would be one of the last governmental functions to be de-politicized. If my argument for anarchy is flawed and anarchy is not a viable method of social organization, this will undoubtedly be revealed long before doing away with national defense becomes an issue. On the other hand, to the extent that the gradual transition from government to anarchy is successful, the need for national defense continually lessens.

Consider what it would mean for a nation to seriously undertake a process of de politicization. Every reduction in the size and scope of government releases more of the creative energy of

the population. The economic effects of this are well-known and are currently being demonstrated in China. As economists point out, revolutionary change can be wrought by marginal effects. Even a slow process of liberalization that is sustained over time will produce massively accelerated economic and technological growth. And the increase in freedom and prosperity in this nation would have profound external effects as well. Many of the bravest and most industrious residents of more repressive nations would attempt to immigrate to the liberalizing one, and some other nations would learn by the liberalizing nation's example and begin to copy its policies.

As the economic and technological gap between the liberalizing nation and the rest of world widens, as the rest of the world becomes more dependent upon the goods and services manufactured and supplied by that nation, and as a greater number of other nations are moved to adopt liberalizing policies themselves, the threat the rest of the world poses to the liberalizing nation decreases. Evidence of this is supplied by the demise of the Soviet Union. Radical regimes and terrorist organizations may constitute a serious and continuing threat, but consider it in historical context. Such a threat is considerably less serious and less expensive to address than the threat of thermonuclear war.

Recall that we are considering the cost only of protecting citizens against aggression, not the cost of foreign adventures or "pre-emptive" warfare. How significant a threat of foreign invasion does the United States currently face? How much of its "national defense" spending is actually devoted to preventing such invasion? After years or decades of continual and sustained reduction in the size of government, how much wider will the economic and technological gap between the prenatal anarchy and the more repressive nations be? How much more sophisticated its defensive technology?

How much more dependent will the repressive nations be on its goods and services? Let a nation begin to tread the path toward anarchy and by the time the question of whether national defense is a public good that must be supplied by government becomes relevant, it is very likely to be moot.

Continued in [\*The Obviousness of Anarchy: Conclusion\*](#)

### **Footnotes**

[31] See Ronald H. Coase, The Lighthouse in Economics, 17 JOURNAL OF LAW AND ECONOMICS 357 (1974).

[32] CHRISTOPHER W. MORRIS, AN ESSAY ON THE MODERN STATE 60-61 (1998).

[33] See William M. Landes & Richard A. Posner, Adjudication as a Private Good, 6 JOURNAL OF LEGAL STUDIES 235 (1979).

[34] For the true intellectuals among my readers who simply cannot accept that facts should be allowed to undermine a perfectly good theoretical model, I refer you to DAVID SCM ID TZ, THE LIMITS OF GOVERNMENT: AN ESSAY ON THE PUBLIC GOODS ARGUMENT (1991). Schmidtz explains how the assurance problem can be handled by the assurance contract or money back guarantee and how the free rider problem can be cabined to a relatively small number of cases in which using coercion to produce the public good is ethically questionable.

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1. People who enjoy public goods that requires voluntary contributions, may instead of helping to pay for them, may attempt to free ride on the contribution of others.

Without the assurance that enough people will pay, people may assume their own contributions as a waste of investment. The solution to this would be to refund all the contributors, similar to the

crowdfunding campaigns that don't reach their goal (all-or-nothing).

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## The Obviousness of Anarchy: Police - The Art of Not Being Governed

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Continued from [The Obviousness of Anarchy: Courts](#)

Regardless of whether a state is needed to supply law and courts, supporters of government are adamant that police must be supplied exclusively by government. It may be true that the market can adequately supply most goods and services, but police services are unique in that they inherently involve the use of coercion. Obviously, no civilized society can permit competition in the use of violence. Civil society is formed precisely to escape from that situation. Unless government brings the use of violence under its monopolistic control, peaceful coexistence is impossible, and life is indeed as “nasty, brutish, and short” [23] as Hobbes contended.

Before I respond to this by suggesting that you look around, reflect for a moment on the silliness of this argument. For if civil society cannot exist without a government monopoly over the use of coercion, then civil society does not exist. Societies do not spring into existence complete with government police forces. Once a group of people has figured out how to reduce the level of interpersonal violence sufficiently to allow them to live together, entities that are recognizable as governments often develop and take over the policing function. Even a marauding band that imposes government on others through conquest must have first reduced internal strife sufficiently to allow it to organize itself for effective military operations. Both historically and logically, it is always peaceful coexistence first, government services second. If civil society is impossible without government police, then there are no civil societies.



In the 1960's Broadway musical *Oliver*, there is a song called “Be Back Soon” in which Fagan’s boys sing the line “We know the Bow Street Runners.” The Bow Street Runners were famous because they were London’s first government sponsored police force, organized in the latter half of the 18th century by the magistrates of the Bow Street court, Henry and John Fielding. I think it is fair to say that the formation of the Bow Street Runners does not represent the moment that London was transformed from a Hobbesian state of nature to a civil society.

Note also the conflation of police services with coercion. Coercion may be employed aggressively for purposes of predation or defensively to repel attempts at predation. Police services involve the use of coercion for defensive purposes only. Competition among aggressors is, indeed, a bad thing that is antithetical to the existence of civil society. But it is not competition for the provision of police services. If competition among those offering the defensive use of coercion inevitably resulted in the equivalent of aggressive gang warfare, then we would want to eschew such competition. But whether this occurs is the very question under consideration. Identifying competition among providers of police services with competition among aggressors is entirely question-begging. It is avoiding, rather than making, an argument.

But I digress. The proper response to the claim that government must provide police services is: look around. I work at a University that supplies its own campus police force. On my drive in, I pass a privately operated armored car that transports currency and other valuable items for banks and businesses. When I go downtown, I enter buildings that are serviced by private security companies that require me to sign in before entering. I shop at malls and department stores patrolled by their own private guards. While in the



mall, I occasionally browse in the Security Zone store that sells personal and home protection equipment. I converse with attorneys and, once in a while with a disgruntled spouse or worried parent, who employ private detective agencies to perform investigations for them. I write books about how the United States Federal government coerces private corporations into performing criminal investigations for it. [24] When I was younger, I frequented nightclubs and bars that employed “bouncers.”

Although it has never happened to me personally, I know people who have been contacted by private debt collection agencies or have been visited by repo men. Once in a while, I meet people who are almost as important as rock stars and travel with their own bodyguards. At the end of the day, I return home to my community that has its own neighborhood watch. I may be missing something, but I haven’t noticed any of these agencies engaging in acts of violent aggression to eliminate their competitors.

Ah, but that is because the government police force is in the background making sure that none of these private agencies step out of line, the supporters of government contend. Really? How does that explain London before the Bow Street Runners? The New York City police force was not created until 1845. The Boston Police Department, which describes itself as “the first paid, professional public safety department in the country” [25] traces its history back only to 1838. What kept the non-political police services in line before these dates?

Regardless of Hobbes’ and Locke’s philosophical musings, for most of English history, there was little government provision of police services. [26] It is true that as the kings of England learned how to collect revenue by declaring all violence and sinful activity a breach of the King’s peace for which they were owed payment, they began to develop an administrative machinery to facilitate the collection of fines for “criminal” activity.

Thus, the local representative of the Crown, the shire reeve (later sheriff), became tasked with reporting and eventually apprehending offenders. But since the sheriffs were only interested in pursuing offenders with the means to pay the amercement, this never represented a significant portion of the police activity within the realm. The customary, non-political methods of policing provided security for most of the population of England until quite recently.

My father’s oldest brother, who was born in 1902, often told me about the tontine insurance arrangement my grandfather participated in through his fraternal organization that provided both term life insurance and an old age annuity. Since the advent of the federal social security program, you don’t hear much about tontine insurance. Most residents of New York, who assume that only the government can provide and maintain the city’s subway system, are puzzled as to why part of the system is named the BMT and part the IRT. They have no idea that in 1940, the City of New York purchased the privately built and operated Brooklyn-Manhattan Transit Corporation and the Interborough Rapid Transit Company to create the city-run Metropolitan Transportation Authority. When government begins providing services formerly provided non-politically, people soon forget that the services were ever provided non-politically and assume that only government can provide them. But just as this is not true for old age annuities and subway service, it is not true for police services. Traditionally, police services were not provided by government and, to a large extent, they still are not. Therefore, government is not necessary to provide police services.

Advocates of government can still argue that because of the special nature of police services, a government monopoly can provide such services more efficiently than non-political entities can. I must concede that there is nothing a priori wrong with this argument. It is certainly possible that when it comes to police services, a miracle occurs and investing a single politically-directed agency with the power to supply the desired services by exacting involuntary payment from all members of society actually produces a better result than allowing the services to be supplied by non-political means. I can, however, find no



evidence for this in the real world. To all outward appearances, when police services are supplied by a politically-controlled monopoly, the public receives police services driven by political, rather than efficiency, considerations. Thus, disfavored, politically powerless groups are typically underserved, police resources are frequently directed toward politically favored ends (e.g., suppression of victimless crimes) rather than their most productive use (e.g., suppression of violence), and the nature of the service is determined by political budgetary concerns rather than actual need (e.g., SWAT teams in Wisconsin). Further, because government police are not dependant on voluntary contributions for their revenue, they are less likely to be responsive to the concerns of the public (e.g., police brutality) and more susceptible to corruption (see e.g., the Knapp Commission Report<sup>27</sup> or just watch the movie *Serpico*).

Supporters of government often point to the high inner-city crime rate, the profusion of violent gangs, and the persistence of organized crime and drug cartels to argue that we dare not abandon the government monopoly on police services. I confess to being perplexed by this argument. How can highlighting the utter failure of the government system of policing possibly be an argument for its necessity?

It is worth noting that the contemporary crime problem is most severe where non-political methods of policing have been most completely displaced by government. The inner cities are the areas most dependant on government policing. Arguing that the high rate of inner-city crime and the presence of gangs implies that we must maintain a government monopoly on police services is a bit like arguing that the abysmal quality of inner-city public schools implies that we should not permit parents to use their tax money to send their children to private schools. And it can hardly be surprising that it is difficult to suppress the violent organizations that exist to exploit the black markets created by government prohibitions on the legal marketing of drugs, prostitution, gambling, and other "vices." But how any of this demonstrates the necessity of government provision of police is beyond me.

If a visitor from Mars were asked to identify the least effective method for securing individuals' persons and property, he might well respond that it would be to select one group of people, give them guns, require all members of society to pay them regardless of the quality of service they render, and invest them with the discretion to employ resources and determine law enforcement priorities however they see fit subject only to the whims of their political paymasters. If asked why he thought that, he might simply point to the Los Angeles or New Orleans or any other big city police department. Are government police really necessary for a peaceful, secure society? Look around. Could a non-political, non-monopolistic system of supplying police services really do worse than its government-supplied counterpart?

Continued in ***The Obviousness of Anarchy: Internalizing Externalities***

## Footnotes

[23] T. HOBBS, LEVIATHAN 107 (H. Schneider ed., 1958) (1651).

[24] See JOHN HASNAS, TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW (2006).

[25] See Boston Police Department web site at: <http://www.cityofboston.gov/police/glance.asp>.

[26] See BRUCE BENSON, THE ENTERPRISE OF LAW, 73-74 (1990).

[27] See KNAPP COMMISSION, THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION.

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# The Obviousness of Anarchy: Internalizing Externalities - The Art of Not Being Governed

notbeinggoverned.com

by John Hasnas, Associate Professor, Georgetown University, J.D., Ph.D, LL.M.

Continued from [The Obviousness of Anarchy: Police](#)

Supporters of government often argue that government is essential to provide needed regulation of market activities. Individuals contracting with each other in a market often act in ways that impose harm or unconsented to costs on others. Manufacturers make and consumers purchase products whose use imposes an unacceptable risk of injury on third parties.

For example, automobile companies can produce and drivers will purchase cars that can move at speeds or have handling properties that create an unreasonable risk of injury to pedestrians. Oil companies can ship oil to consumers in ways that create an unreasonable risk of spills that would pollute the land or body of water over which the oil is transported. More generally, because people do not bear the costs their activities impose on others, they will often act in ways that impose greater costs on society than are justified by the personal benefits they realize. These unconsidered costs to others are the social costs of market activity; what economists call *negative externalities*.



*rules not rulers*

Supporters of government contend that only government can regulate market activity to ensure that private contractors consider the social costs of their transaction. Thus, even if rules of law, courts, and police services could be supplied non-politically, government would nevertheless be essential to internalize externalities.

I must confess that I am at a loss as to how to respond to this argument.

Look around is not enough. That this argument has any plausibility at all is a testament to how completely oblivious people can be to the world around them. In a world in which one of the dominant political issues is tort reform; in which businesses are continually complaining to Congress that they are over-regulated by the common law of tort and begging government to protect them from this non-political method of internalizing externalizes, how can anyone seriously assert that government regulation is needed to deal with the problem of social costs?

It is true that economists posit a fictitious realm in which human beings engage in voluntary transactions free of all forms of regulation. But they do so because such an idealized conception of the market is useful to their exploration of the science of human interaction in much the same way that the concept of a perfect vacuum is useful to physicists exploring the laws of nature; not because they think it corresponds to anything in reality. In the real world, human interaction is always subject to regulation; by custom, by people's ethical and religious beliefs, and, in our legal system, by the common law. Tort law is precisely that portion of the law that evolved to protect individuals' persons and property from the ill-considered actions of their fellows, that is, to internalize externalities. It is only by ignoring the existence of these forms of non-political regulation, that is, only by believing that the economists' model of the market is a description of reality, that one could possibly believe that government is necessary to address the problem of social costs. Of course, one should never underestimate the power of a conceptual model to blind intellectuals to what is going on in the real world.

But, supporters of government claim, common law can never be an adequate regulatory mechanism

because it is necessarily retroactive in operation. Lawsuits arise only after harm is done. Therefore, civil liability could never provide the type of proactive regulation necessary to prevent serious harm from occurring. Really? The basic rules of tort law prohibit individuals from intentionally harming others and require them to act with reasonable care to avoid causing harm inadvertently. There is nothing retroactive about this. It is true that precisely what constitutes reasonable care may have to be determined on a case by case basis, but in this respect, the common law is no different than government legislation that announces a general rule and then leaves it up to the courts to determine how it applies in particular cases.

Furthermore, the common law can act prospectively in appropriate cases. The injunction, an order not to engage in a specified activity, evolved precisely to handle those cases in which one party's conduct poses a high risk of irreparable harm to others. [28] And by the way, government legislation is almost always retroactive as well.

Limitations on human knowledge (not to mention public choice considerations) mean that legislators are rarely able to accurately anticipate future harm. Megan's law required public notification when a known sex offender moves into a community. It is called Megan's law because it was enacted after Megan was killed by a repeat sex offender who lived in her community. If I remember correctly, Sarbanes-Oxley was passed after Enron collapsed. And when was the USA Patriot Act passed? Oh, yes, after 9/11.

Until 1992, fast food restaurants served coffee at between 180 and 190 °F, a temperature at which the coffee can cause third degree burns in two to seven seconds if brought into contact with human skin. This posed a considerable risk of serious injury, given how often coffee served in styrofoam cups is spilled. I did not notice any proactive legislative regulation designed to internalize this externality.

In 1992, Stella Liebeck won a judgment against McDonald's for injuries received when she spilled coffee on herself equal to her medical expenses plus the amount of profit McDonald's earned in two days from knowingly selling coffee at a dangerously high temperature. [29] The next day every fast food restaurant in the United States served its coffee at 158 °F, a temperature at which it takes 60 seconds to cause third degree burns; a sufficient amount of time for customers to brush the coffee off their clothes or skin. There may be many things wrong with contemporary tort law, [30] but being ineffective at internalizing externalities is most assuredly not among them.

The only way to believe that government is necessary to resolve the problem of social costs is to be studiously blind to the nature of both common law and government legislation.

Continued in [\*The Obviousness of Anarchy: Public Goods\*](#)

## Footnotes

[28] Note that to obtain an injunction at common law and thereby curtail another citizen's freedom, one must meet a very high evidentiary threshold by establishing a high likelihood of irreparable harm. This is in contrast to government legislation that can curtail citizens' freedom whenever the politically dominant faction of the legislature deems it necessary, even if only to effectuate the "precautionary principle." I leave it to the reader to decide which is the superior standard for addressing potential future harm.

[29] The judgment was reduced by 20% to take account of Ms. Liebeck's contributory negligence with regard to how she opened the cup. This amount was further reduced on appeal.

[30] Almost all of which are attributable not the way it evolved at common law, but to twentieth century efforts to improve upon the outcome of this evolution. See John Hasnas, What's Wrong with a Little Tort Reform? 32 IDAHO LAW REVIEW 557 (1996).

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1. i love this series. thanks for posting!

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# The Obviousness of Anarchy: Courts - The Art of Not Being Governed

notbeinggoverned.com

*Written by John Hasnas, Associate Professor, Georgetown University, J.D., Ph.D, LL.M.*

Continued from [The Obviousness of Anarchy: Accessibility of Rules of Law](#)

Now that we have eliminated the legislature, what about the judiciary? Supporters of government claim that government is necessary to provide a system of courts for settling disputes. In the absence of the government provision of “a known and indifferent judge,” [15] human beings would have no way to peacefully resolve interpersonal disputes. For “men being partial to themselves,” [16] adverse parties would inevitably seek to employ judges who would favor their interests; and judges, who would receive their fees from the litigants, would naturally favor those who could pay the most.

Hence, they would not be impartial. Because parties would be unable to agree on a neutral arbiter, they would be forced to resort to violence to resolve their disputes. Thus, without government courts, peaceful coexistence is impossible.



I know this is getting boring, but the proper response to this is: look around. This is the age of globalization. Business is contracted around the world among parties from virtually all countries. Although there is neither a world government nor world court, businesses do not go to war with each other over contract disputes. News is almost always the news of violent conflict. The very lack of reporting on international business disputes is evidence that international commercial disputes are effectively resolved without the government provision of courts. How can this be?

The answer is simplicity itself. The parties to international transactions select, usually in advance, the dispute settlement mechanism they prefer from among the many options available to them. Few choose trial by combat. It is too expensive and unpredictable. Many elect to submit their disputes to the London Commercial Court, a British court known for the commercial expertise of its judges and its speedy resolution of cases that non-British parties may use for a fee. [17] Others subscribe to companies such as JAMS/Endispute or the American Arbitration Association that provide mediation and arbitration services. Most do whatever they can to avoid becoming enmeshed in the coils of the courts provided by the federal and state governments of the United States, which move at a glacial pace and provide relatively unpredictable results. The evidence suggests that international commercial law not only functions quite well without government courts, it functions better because of their absence.

But there is no need to focus on the international scene to observe that human beings do not need government courts to settle disputes peacefully. Labor contracts not only specify wage rates and working conditions; they create their own workplace judiciary, complete with due process guarantees and appellate procedures. Universities regularly provide their own judicial processes, as do homeowner associations. Stockbrokers agree to submit employment disputes to binding arbitration as a condition of employment. [18] Religious groups regularly settle disputes among congregants by appeal to priest or rabbi. Disfavored groups, for whom prejudice makes trial in government courts a mockery, readily devise alternative mechanisms for settling disputes without violence. [19] Insurance companies provide not only compensation for personal injury and property damage, but liability insurance, by which they assume the responsibility of resolving conflicts between their clients and those of other insurance companies according

to antecedently specified agreements that allow them to avoid the morass of the government judicial system. And empirical evidence demonstrates that when potential litigants in the government court system are directed into mediation, a significant portion of the lawsuits are resolved without trial. [20]

But don't just look around. Look back. Tax supported courts of general jurisdiction are an entirely modern phenomenon. Anglo-American law evolved in the context of a richly diverse set of competing jurisdictions. The royal courts, once they developed, existed in parallel with the antecedently extant hundred, shire, manorial, urban, ecclesiastical, and mercantile courts. [21] These court systems had fluid jurisdictional boundaries, and because the courts collected their fees from the litigants, they competed with each other for business. Indeed, the law of contracts and trusts, which evolved in the ecclesiastical courts, and commercial law, which evolved in the mercantile courts, entered the common law as a result of this competition. Further, the royal courts themselves consisted of four different and competing courts: king's bench, common pleas, exchequer, and chancery. These courts, like the others, collected their fees from the litigants, and hence, competed among themselves for clients. It was only with the Judicature Act of 1873 and the Appellate Jurisdiction Act of 1876 that the British government assembled its courts into its present monolithic, hierarchical structure, with American courts following suit at varying intervals thereafter.

Further, focusing on the competition among the common law courts misleadingly underestimates the diversity of the dispute settlement mechanisms that were actually employed. Because the cost of utilizing the common law courts was too great for the typical working man, those courts were virtually irrelevant to the majority of the population. Most citizens resolved their disputes according to informal, customary procedures that varied with the location (urban or rural) and class of those employing them. [22]

Since our present relatively non-violent, capitalistic society evolved in the context of a diverse and competitive system of courts and dispute settlement mechanisms, it cannot be the case that government provision of courts is necessary for peaceful settlement of disputes. In fact, a comparison of the amount of rancorous dissatisfaction produced by the contemporary government-supplied judiciary (consider the tort reform movement) with that associated with the more variegated traditional system of resolving disputes suggests that the government provision of courts reduces rather than augments social peace.

Continued in [\*The Obviousness of Anarchy: Police\*](#)

## Footnotes

[15] John Locke, Second Treatise of Government, edited by C.B. Macpherson (Indianapolis, Indiana: Hackett Pub. Co., 1980) (1690), p. 66.

[16] Id.

[17] See Mary Heaney, Where Business is King: London' Commercial Court Hears International Clashes, NAT'L L.J., June 5, 1995, at C1; Campbell McLachlan, London Court Reigns as an International Forum: Parties in Cross-Border Disputes Welcome the Commercial Court's Expertise, Neutrality, and Speed, NAT'L L.J., June 5, 1995 at C4.↵

[18] Of course, this is mainly a measure designed to allow financial firms to escape from the quagmire of United States employment litigation.

[19] See Yaffa Eliach, Social Protest in the Synagogue: the Delaying of the Torah Reading, in THERE ONCE WAS A WORLD 84-86.

[20] See Joshua D. Rosenberg & H. Jay Folberg, Alternative Dispute Resolution: an Empirical Analysis, 46 STAN. L. REV. 1487 (1994).

[21] See HAROLD BERM AN, LAW AND REVOLUTION (1983).

[22] See E. P. THOM PSON, CUSTOM S IN COM M ON: STUDIES IN TRADITIO NAL POPULAR CULTURE (1993).



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# The Obviousness of Anarchy: Conclusion - The Art of Not Being Governed

notbeinggoverned.com

by John Hasnas, Associate Professor, Georgetown University, J.D., Ph.D, LL.M.

Continued from [The Obviousness of Anarchy: Public Goods](#)

Aristotle called man the rational animal, identifying human beings' ability to reason as their essential defining characteristic. I think this is a mistake. I think man is the imaginative animal. Human beings undoubtedly have the ability to reason, but they also have the ability to imagine that the world is different than it is, and the latter is a far more powerful force.

People root for the Chicago Cubs because they can imagine the Cubs winning the World Series, despite all evidence to the contrary. People regularly get married because they can imagine that they will change their obviously incompatible partner into the ideal husband or wife. People devote their time, effort, and money to political campaigns because they can imagine that if only Bill Clinton or Bob Dole or George W. Bush or John Kerry were elected, Washington, DC would be transformed into Camelot. And more significantly, people volunteer to fight wars because they can imagine themselves running through a field of machine gun fire unscathed. Only the ability to imagine an afterlife for which they have absolutely no evidence can explain why human beings would strap explosives to themselves and blow themselves up in an effort to kill as many innocent people as possible.



*rules not rulers*

Do you ever wonder why people believed in the divine right of kings, despite the fact that the monarchs of their time were patently not the type of individuals an all-knowing, all-good god would choose to reign over them? They believed in it because they were taught to believe in it and because they could imagine that it was so, regardless of all evidence to the contrary. We no longer believe in such silly things as the divine right of kings. We believe that government is necessary for an orderly peaceful society and that it can be made to function according to the rule of law. We believe this

because we have been taught to believe it from infancy and because we can imagine that it is so, regardless of all contrary evidence.

One should never underestimate the power of abstract concepts to shape how human beings see the world. Once one accepts the idea that government is necessary for peace and order and that it can function objectively, one's imagination will allow one to see the hand of government wherever there is law, police, and courts and render the non-political provision of these services invisible. But if you lay aside this conceptual framework long enough to ask where these services originated and where, to a large extent, they still come from, the world assumes a different aspect. If you want the strongest argument for anarchy, simply remove your self-imposed blinders and look around.

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1. With all due respect, I'm very skeptical about this.

Sure, governments are doing a lousy job, but it would be a grave error to believe that simply removing them would lead to paradise.

See, the human animal tends to form groups – be it clans, gangs, cults or governments. Be it companies, sports teams or internet communities.

The moment you dissolve one such group, a vacuum is created, and soon enough another one takes its place. This is an emergent behavior we all engage in without knowing it. It all happens without conscious intention on part of any individual.

Without a ‘justice system’ there would be ku klux klans and all sorts of vigilantism. The human mind is not as innocent as we’d love to believe.

Unfortunately, somebody has to protect us from ourselves. However much we’d love to believe otherwise.

There’s hope though: We could educate ourselves about how our minds work – and correct for the systemic error. Without such education, anarchy would lead to disaster.

Unfortunately.

1. I understand your point that many people want to form groups. But it’s a mistake to think all people want to be a member of a group, e.g. “Redskins fan” or “Democrat” or whatever. And depending on the time of day, we are fiercely individualistic or we are collectivist. But we do it all for our own self interest – selfish reason.

A few weeks back the series discussed the justice system in Ancient Ireland – they had arbitration without government for hundreds of years. And today’s codified laws are based on common law, which originated outside the State as well.

“Someone needs to protect us from ourselves.” – I don’t even want to address this. It’s too ridiculous.

The real deal is that we practice anarchy most of the day. We associate voluntarily. You do that too, unless you are being tortured right now in a gulag. Anarchy is right before your very eyes.

We are an imaginary animal for sure. Because we can imagine away the reality that we, as a species, could never have advanced without predominately voluntarily associating, i.e. anarchy. The 1% of the time that people do not voluntarily associate is when they are participating in the political process and voting for new masters over everyone, including those who do not want rulers.

## Reply

1. it’s a mistake to think all people want to be a member of a group, e.g. “Redskins fan” or “Democrat” or whatever. And depending on the time of day, we are fiercely individualistic or we are collectivist. But we do it all for our own self interest – selfish reason.

My point is precisely that we end up in groups without a conscious intention. It’s a subconscious need. Our whims only seem random, they end up pushing up in a certain direction – whether we want to acknowledge it or not.

A few weeks back the series discussed the justice system in Ancient Ireland –

they had arbitration without government for hundreds of years.

You could post a link here.

Without having read it, I'll venture a guess: When they deemed it important, people gathered together and decided the fate of certain individuals. An important but not officially or consciously acknowledged factor in the decisions was the popularity of those individuals – some got worse treatment than others.

“Someone needs to protect us from ourselves.” – I don't even want to address this. It's too ridiculous.

There has to be a way to protect the unpopular from the majority.

A government is surely a lousy attempt at that, but there has to be some system in place. I don't know what. Leaving things to the crowd can have horrible consequences for the people the crowd doesn't care about.

[Reply](#)

1. Crowd better be ready for some lead if one is so unpopular. I swear it was in self-defense.

[Reply](#)

2. I'm working on a step-by-step guide on what to replace our government with. It's not finished though.

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# The Obviousness of Anarchy: Accessibility of Rules Of Law - The Art of Not Being Governed

notbeinggoverned.com

*Written by John Hasnas, Associate Professor, Georgetown University, J.D., Ph.D, LL.M.*

Continued from [The Obviousness of Anarchy: Uniformity of Rules Of Law](#)

Supporters of government claim that government must make the law in order for it to be accessible to the citizens to be governed by it. The government promulgates its legislation in statute books that are available to all citizens. The unenacted rules of common law, they claim, are unintelligible to the lay person. Consisting of rules abstracted from cases over long periods of time, the common law is known only to the judges and lawyers who deal with it as part of their profession. A system of law that requires citizens to hire attorneys merely to find out what the law is is obviously unacceptable.

The proper response to this is: Are you serious? Look around. Please! Can any human being possibly be aware of the myriad of arcane government regulations to which he or she is subject? Have you ever seen the Code of Federal Regulations? When was the last time you tried to prepare your income tax return? Critics of the common law contend that lay people would need professionals to tell them what the law is. Yet, year after year, studies demonstrate that even most professional tax preparers and IRS employees cannot understand what the United States tax code requires. The common law rule that protects citizens against unintentional injury is the requirement to exercise the degree of care a reasonable person would employ to avoid causing harm to others.



This is hardly inaccessible. Does anyone know what all the rules are that the Federal Trade Commission, the Consumer Product Safety Commission, and the National Highway Traffic Safety Administration have issued to accomplish the same end?

The common law consists of rules that have proven over time to be successful in resolving disputes. Only rules that are both intelligible to the ordinary person and correspond to the ordinary person's sense of fairness can achieve this status. Rules which are inaccessible to those to be

governed by them cannot be effective. This is why, for example, the common law rules of contract and commercial law specifically incorporate references to customary business practice and the duty to act in good faith.

It is also why no legal expertise is required to know that the law of self-defense permits one to use deadly force to repel a life-threatening attack, but not to shoot the aggressor after the immediate danger has passed. Understanding the traditional rules of common law requires only that one be a member of the relevant community to which the rules apply, not that one be an attorney.

Government legislation, in contrast, need have no relationship to either the understanding or the moral sensibility of the ordinary person. Legislation is law created through the political process. As such, it is inherently responsive to political considerations. Such considerations can, and frequently do, produce rules that are not intelligible to the ordinary person. This is not merely because special interests can skew the legislative process. Even if legislators were selflessly devoted to the common good, they would still need some principle of justice or moral ideal to guide their law-making.

But there is no guarantee that the measures necessary to effectuate such principles or ideals will

correspond to the understanding of the ordinary person. The Civil Rights Act of 1964 may have been the noblest legislative effort of our age, but the ordinary person is unlikely to understand why requiring pizza delivery men to be clean shaven constitutes illegal racial discrimination<sup>10</sup> or how a company with a work force consisting of almost all minorities can nevertheless be guilty of discrimination.<sup>11</sup>

Fraud, as it evolved at common law, consists of intentionally misrepresenting a material fact that another relies upon in parting with his or her property. It is not difficult for the ordinary person to appreciate that such action may be against the law. Fraud, as defined by federal legislation, consists of any scheme or artifice to defraud. It does not require a misrepresentation of fact. Any misleading statement or non-disclosure will do.

It does not require that anyone actually be misled or rely on the statement or non-disclosure. It does not require that anyone suffer any loss.<sup>12</sup> Martha Stewart was recently put on trial for securities fraud for the act of publicly declaring her innocence of insider trading.<sup>13</sup> It is probably fair to say that the ordinary person would not know that Stewart's comments to the media constituted a federal crime.

I understand the argument that if we had a night watchman state whose legislation was limited to simple, clear rules that are designed to secure individual rights, the law would be perfectly accessible. There are only two problems with this argument. The first is that in such a case, the legislation would merely reproduce the basic rules of common law.

There is no need to create a government merely to publicize such rules. This can be, and is, done privately. The "restatements" of the common law are currently privately produced, easily accessible, and widely cited. The second is that it is impossible. The idea that there is a concise set of simple, clear rules that can preserve a peaceful, free society is a fantasy.<sup>14</sup> This becomes apparent even with regard to the fundamental rules barring aggression as soon as one attempts to specify the conditions under which force may be used in self-defense or for the defense of others, or is excused by mistaken belief or insanity. And that is without considering that these fundamental rules must be supplemented by the rules of contract, property, and tort law that are necessary for people to coordinate their behavior well enough to engage in peaceful cooperation.

Legislation, even libertarian legislation, will either reproduce the common law or depart from it to gratify a political interest or realize some conception of justice. In the former case, it is precisely as accessible or inaccessible as the common law. In the latter, it will diverge from the common sense morality of the ordinary person, producing rules that are less accessible than the common law. Not only is government not necessary to ensure that the rules of law are accessible, it inevitably renders them less so.

## Footnotes

10 See *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795 (8th Cir. 1993).

11 See *Connecticut v. Teal* 457 U.S. 440 (1982).

12 For a fuller account of the federal fraud statutes, see John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AMERICAN UNIVERSITY LAW REVIEW 579 (2005).

13 See Indictment, *United States v. Stewart*, 37 (S.D.N.Y. 2003) (No. 03 Cr. 717).

14 For more on this, see John Hasnas, *The Myth of the Rule of Law*, 1995 WISCONSIN LAW REVIEW 199 (1995).

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